STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED February 16, 2010
v	No. 287178 Ottawa Circuit Court
ALFREDO JAVIER LUNA, Defendant-Appellant.	LC No. 07-032047-FC

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	
v	No. 287216 Ottawa Circuit Court LC No. 07-032048-FC
SANTIAGO JAIME LEOS, Defendant-Appellant.	

Before: K. F. Kelly, P.J., and Hoekstra and Whitbeck, JJ.

PER CURIAM.

This consolidated appeal involves two defendants tried by the same jury. In docket no. 287178, defendant Alfredo Javier Luna, appeals as of right his jury trial convictions of two counts of first-degree murder. MCL 750.316(1)(a). In docket no. 287216, defendant Santiago Jaime Leos appeals as of right his jury trial convictions of two counts of first-degree murder. MCL 750.316(1)(a). We affirm.

I. Basic Facts

In 1988, Michael Osborne, one of the victims in this case, had been in a homosexual relationship with defendant Leos for the preceding five or six years. The two lived together on Ninth Street in Holland, Michigan, and both regularly socialized at the Moose Lodge. Sometime in early 1988, Leos began to suspect that Osborne was sleeping with another man, Michael VanEenenaam. His suspicions were confirmed when he found them in bed together on, or around, March 5, 1988.

Shortly thereafter, Osborne and VanEenenaam were reported missing to the police. Several months later, during the following autumn, their bodies were found in the Allegan Woods, just outside Holland. Although the police suspected Leos in their murders, the investigation failed to proceed because witnesses were unwilling to cooperate. The investigation was unfruitful and the case "went cold."

The case was reopened in the mid-2000s. New technology permitted the police to match blood found on the carpet of the Ninth Street residence to that of VanEenenaam. In addition, some witnesses had come forward with new information and other witnesses came forward with information they had not previously revealed. For example, Christopher Sanchez, who had previously been incarcerated with Luna on two occasions, came forward with information that Luna had made statements in 1991 and more recently in 2008 that he had been involved in the murders and had been paid $1000 for the killing. In addition, John Towne, a friend of Leos' back in the late 1980s, had offered information in 1991 in hopes of a sentencing deal in his own case but never provided it when law enforcement was unwilling to reduce his sentence in exchange for the information. He was re-contacted in 2006 and provided the police with information that Leos and Luna had given him four pounds of marijuana in exchange for his efforts to try and locate the bodies and burry them somewhere else where no one would find them. A former bartender at the Moose Lodge, Lois Stevens, also indicated that she overheard a conversation between Leos, with whom she was acquainted, and Luna in which Luna said he could take care of Leos' problem for enough money. Lastly, two eye-witnesses were identified, Tony Ayala and Sylvia Uvalle, both of which identified Leos and Luna as the perpetrators, and both of which had given the police false accounts previously. As a result, both defendants were charged with two counts of first-degree murder.

At trial, Ayala and Uvalle testified to the events that occurred on the evening of March 8, 1988. According to Ayala,[1] he was a friend of Luna and Leos beginning sometime in the early 1980s. Typically, Ayala would "party" with both Luna and Leos. On March 8, 1988, Ayala and Luna were getting ready to go out drinking. Before heading to the bar, they stopped at Leos' house, and when they found he was not there, they went to the Moose Lodge. Leos was at the Moose Lodge and the three had several beers together. Ayala overheard them say that they were going to "take care of business." Ayala asked them what they were referring to and Luna said not to worry about it. Soon after they left the bar and drove over to Leos' house in Ayala's car. Before going inside, Ayala again asked what was going on and asked Luna why he had a "rolling pin," which looked like a "miniature baseball bat." Luna would not tell Ayala. Luna, Leos, and Ayala then went inside the house, where Osborne and VanEenenaam were.

Once inside, Ayala noticed that Uvalle and Mariana,[2] some other friends, had walked in shortly after him and were in the kitchen. Ayala then heard Leos demand to speak to Osborne.

[1] The police had interviewed Ayala a number of times, but he had lied to them. He had liked Luna, was scared Ayala himself would be charged, and Luna had provided him with beer and marijuana.

[2] The police never located Mariana; supposedly, she was an illegal immigrant at the time of these events.

Osborne, however, told Leos "Not right now," and turned to speak to someone else. According to Ayala, Leos then grabbed a "mace" from the wall and struck Osborne in the back of the head with it. VanEenenaan got up and tried to intervene, but Luna grabbed him and threw him to the ground. Ayala saw Leos continue to hit Osborne repeatedly with the mace. Once VanEenenaam was on the ground, Ayala observed Luna grab the "miniature baseball ball" from his pants and start hitting VanEenenaam in the head. VanEenenaam tried to get up, but was not able to because Luna kept hitting him. Leos dragged Osborne into a bedroom and continued hitting him. According to Ayala's account, neither Osborne nor VanEenenaam had a chance to defend himself.

After the beatings stopped, Luna and Leos ordered Ayala, Uvalle, and Mariana to clean up the blood. Leos dragged Osborne's body in the kitchen and started cutting his hand off. Luna and Leos retrieved carpets from somewhere outside the house and rolled up Osborne in one of them. Luna and Leos then carried Osborne's body out to the Ayala's car and threw it in the trunk. They also wrapped VanEenenaam's body in a carpet and took it out to the car. All five of them, Luna, Leos, Ayala, Uvalle, and Mariana, then got in the car and drove to the Allegan woods. Once there, Luna and Leos dragged the bodies into the woods. Uvalle's trial testimony substantially corroborated Ayala's account.

Both defendants were convicted of two counts of first-degree murder. Both were sentenced to two concurrent terms of life imprisonment without parole. This appeal followed.

II. Docket No. 287216

A. Ineffective Assistance of Counsel

Defendant Leos first argues that defense counsel was ineffective. We review claims of ineffective assistance of counsel de novo. *People v McMullan*, 284 Mich App 149, 155; 771 NW2d 810 (2009). Because Leos failed to raise this issue below, our review is limited to errors apparent on the record. *People v Harris*, 201 Mich App 147, 154; 505 NW2d 889 (1993). To prevail on a claim of ineffective assistance, a defendant must show that counsel's performance was deficient, such that it fell below an objective standard of reasonableness under prevailing professional norms, and that his defense was prejudiced as a result. *People v Davenport*, 280 Mich App 464, 468; 760 NW2d 743 (2008). To demonstrate the latter, a defendant must show that there is a reasonable probability that but for counsel's error, the result of the proceedings would have been different. *People v Uphaus (On Remand)*, 278 Mich App 174, 185; 748 NW2d 899 (2008). In addition, a defendant must overcome a strong presumption that counsel's actions constituted sound trial strategy. *Id*. at 186.

i. Intimidation of Witnesses

Leos first contends that counsel was ineffective for failing to move to suppress the eyewitness testimony of Ayala and Uvalle. According to Leos, these two witnesses were improperly intimidated by law enforcement, thereby causing them to inculpate defendant. We disagree. It is true that a prosecutorial intimidation of witnesses is condemned. *People v Crabtree*, 87 Mich App 722, 725; 276 NW2d 478 (1979). Threats from law enforcement are also attributable to the prosecution. *People v Canter*, 197 Mich App 550, 569-570; 496 NW2d

336 (1992). Successful attempts at intimidation may violate a defendant's right to due process of law. *People v Stacy*, 193 Mich App 19, 25; 484 NW2d 675 (1992).

The question as to Uvalle and Ayala is whether they were pressured into lying by investigators at trial. Our review of the record does not support such a conclusion as to either witness. The jury was able to hear the various reasons why both witnesses' initial accounts were inconsistent with their trial testimonies. Uvalle indicated that a detective had insinuated that she could be charged with an offense, but she did not testify that this alleged threat had caused her to lie at trial. According to Uvalle, she had not previously told the truth because she was afraid of getting "locked up" and Luna and Ayala had threatened to harm her or her family. She further testified that her trial testimony was the truth. As to Ayala, the pertinent portions of investigators' alleged threats or insinuations of jail time were paraphrased for the jury during defense counsel's cross-examination. Ayala indicated at trial that he had not previously told the truth because he was afraid of being charged with the murders, but he confirmed that his trial testimony was the truth. Under these circumstances, the trier of fact was able to perform its traditional role of weighing the evidence and ascertaining the credibility to be afforded his testimony.

Given the foregoing, we are not of the view that Leos' due process rights were violated; the record does not unequivocally support the conclusion that these witnesses were pressured into lying at trial. Rather, as already stated, each witness, when asked whether his or her testimony was the truth, indicated that it was. Accordingly, it would have been futile for defense counsel to move to suppress Uvalle and Ayala's testimonies on the basis that their testimonies were the product of intimidation. See *People v Brown*, 279 Mich App 116, 142; 755 NW2d 664 (2008). And, in any event, defendant was not prejudiced as a result because the jury was made aware of the alleged acts of intimidation and both witnesses affirmed the truth of their testimonies. See *Stacy*, *supra* at 30. Accordingly, Leos' contention that counsel was ineffective for failing to move to suppress the testimonies is unavailing.

ii. Polygraph Examination

Leos next argues that counsel was ineffective for failing to object and move for a mistrial when a witness referenced the fact that he had taken a polygraph examination. We disagree. Our review of the record reveals that Leos was not prejudiced as a result of the witness' reference to his polygraph examination. Generally, evidence relating to a polygraph is inadmissible, but not every reference requires reversal. *People v Nash*, 244 Mich App 93, 97-98; 625 NW2d 87 (2000). As this Court has previously determined, it is useful to consider the following factors when determining whether a defendant has been prejudiced by a reference to a polygraph examination:

> (1) whether defendant objected to and/or sought a cautionary instruction; (2) whether the reference was inadvertent; (3) whether there were repeated references; (4) whether the reference was an attempt to bolster a witness's credibility; and (5) whether the results of the test were admitted rather than merely the fact that a test had been conducted. [*People v McGhee*, 268 Mich App 600, 630-631; 709 NW2d 595 (2005) (citations and alterations omitted).]

Here, witness John Towne testified that Leos and Luna had asked him to go to the Allegan woods, locate the bodies, and re-burry them somewhere else. On cross-examination, Towne mentioned, in relation to a prior arrest warrant that he had fled the state to avoid, that the Holland police department urged him to come back and take a polygraph. On redirect examination, the prosecutor inquired whether the matter had been cleared up and asked Towne whether the prosecution had "anything to do with that charge being dismissed as a reward or benefit for you being involved in this case?" Towne replied, "No. My honesty and taking a polygraph cleared it up." Neither of defendants' counsels objected.

In our view, defense counsel's failure to object did not constitute deficient performance. The references to the polygraph exam were inadvertent and non-responsive to the prosecutor's questions. Plainly, the reference was not purposefully solicited and the prosecutor's preceding question was not an attempt to bolster Towne's credibility through a reference to the test. Under these circumstances, it is likely defense counsel chose not to object as a matter of trial strategy—an objection may have drawn unwanted attention to the fact that Towne had taken a polygraph examination and passed it. Accordingly, Leos has failed to overcome the presumption that counsel's decision constituted sound trial strategy and his claim for ineffective assistance of counsel on this basis also fails.

B. Hearsay

Leos next argues that the trial court abused its discretion by permitting the admission of Luna's hearsay statements made to a cellmate while in jail. We disagree. We review a trial court's decision to admit evidence for an abuse of discretion. *People v Washington*, 468 Mich 667, 670; 664 NW2d 203 (2003). "When the decision regarding the admission of evidence involves a preliminary question of law, such as whether a statute or rule of evidence precludes admissibility of the evidence, the issue is reviewed de novo." *Id*. at 670-671.

Generally, hearsay testimony is inadmissible. MRE 802. However, certain exceptions apply to this prohibition and hearsay statements falling within one of these exceptions will be admissible. MRE 804. Included amongst these exceptions are statements against penal interest, for example when a person admits he is guilty of a crime. MRE 804(b)(3); *People v Herndon*, 246 Mich App 371, 408; 633 NW2d 376 (2001). "[This] exception is based on the assumption that people do not generally make statements about themselves that are damaging unless they are true." *Washington*, *supra* at 671. In order for a statement against penal interest to be admissible hearsay, such that it can be used as substantive evidence against someone other then the declarant, the statements against penal interest must have sufficient indicia of reliability. *People v Shepherd*, 263 Mich App 665, 676; 689 NW2d 721 (2004), rev'd on other grounds 472 Mich 343 (2005). As our Supreme Court stated in *People v Poole*, 444 Mich 151; 506 NW2d 505 (1993), courts must evaluate a number of factors to determine whether such statements are sufficiently reliable, including:

> whether the statement was (1) voluntarily given, (2) made contemporaneously with the events referenced, (3) made to family, friends, colleagues, or confederates that is, to someone to whom the declarant would likely speak the truth, and (4) uttered spontaneously at the initiation of the declarant and without prompting or inquiry by the listener.
>
> On the other hand, the presence of the following factors would favor a finding of

> inadmissibility: whether the statement (1) was made to law enforcement officers or at the prompting or inquiry of the listener, (2) minimizes the role or responsibility of the declarant or shifts blame to the accomplice, (3) was made to avenge the declarant or to curry favor, and (4) whether the declarant had a motive to lie or distort the truth. [*Id*. at 165.]

Here, Luna made incriminating statements to a fellow inmate regarding his involvement in the murders. In 1991, Sanchez and other inmates joked that Luna had an effeminate inmate as a girlfriend. In response, Luna stated that he could not stand homosexuals and that was why "we f----d two faggots and left them in the woods to die."[3] Sanchez also overheard some statements Luna made to another inmate that implicated Leos in the murders. Later in 2008, Sanchez saw Luna again in jail, Luna approached him, and a conversation ensued regarding why each was back in jail. According to Sanchez, Luna stated, "Remember what I told you back in '91"? . . . Those [two faggots?] . . . That's what I'm here for, so keep your mouth shut."

There is no indication that Luna's statements were involuntarily given; in fact, it appears that Luna made these statements voluntarily. Luna made these statements to his cellmates, not to police officers or another official who was prompting an inquiry into the events. Further, Luna made these statements contemporaneously with events that were somehow related to the murders. The 1991 statements were made a few years after the murders and in response to his cellmates' references to an effeminate inmate. And, the statements in 2008, although made twenty years after the murder, were made shortly after Luna was arrested on charges for the 1988 murders. Lastly, even assuming that Luna's comments could be interpreted as "boasting in order to curry favor" with other inmates, as defendant argues, we would still find the statements to be sufficiently reliable. The statements Luna made were not prompted by a direct inquiry and the facts that he revealed about the murders are an accurate reflection of what actually happened. Accordingly, our review of the record reveals that the statements had sufficient indicia of reliability, such that they were properly admitted under MRE 804(b). Relief is not warranted on this basis.

C. Jury Instructions

Lastly, Leos insists that the jury should have been given instructions for the crime of voluntary manslaughter. We disagree. We review for an abuse of discretion whether a trial court properly determined that a particular jury instruction is applicable to the facts of the matter. *People v Gillis*, 474 Mich 105, 113; 712 NW2d 419 (2006). After our thorough review of the record evidence we are not of the opinion that the trial court erred by refusing to provide the jury with instructions for voluntary manslaughter. Simply put, the facts of this case do not support such an instruction because there is no indication that Leos acted in the "heat of passion." Accordingly, although voluntary manslaughter is a lesser-included offense of murder, the trial

[3] Sanchez testified at trial that his Spanish was not very good in the early 1990s, but has since improved. At trial, he testified that he now understood Luna's statement to mean, "that's why we beat up two homosexuals and left them in the woods to die."

court was not required to instruct the jury on its elements. See *People v Mendoza*, 468 Mich 527, 540; 664 NW2d 685 (2003).

III. Docket No. 287178

A. Sufficiency of the Evidence

Defendant Luna first argues that the evidence presented at trial was insufficient to support his convictions because the proofs failed to show identity or premeditation. We disagree. We review claims of insufficient evidence de novo. *People v Cline*, 276 Mich App 634, 642; 741 NW2d 563 (2007). In doing so, we must view the evidence in the light most favorable to the prosecution and determine whether a rational trier of fact could find that all the elements of the crimes alleged were proven beyond a reasonable doubt. *Id*. Circumstantial evidence, and the inferences drawn therefrom, may be sufficient to establish a crime's elements. *People v Abraham*, 234 Mich App 640, 656; 599 NW2d 736 (1999). In evaluating this claim, this Court will not disturb the trier of fact's role in determining the weight of the evidence or in assessing the credibility of the witnesses. *People v Passage*, 272 Mich App 277, 177; 743 NW2d 746 (2007).

In this case, Luna was charged and convicted of two counts of first-degree murder. "The elements of [first-degree] premeditated murder are (1) an intentional killing of a human being (2) with premeditation and deliberation." *People v Gayheart*, 285 Mich App 202, 210; ___ NW2d ___ (2009); MCL 750.316(1)(a). "[P]remeditation and deliberation characterize a thought process undisturbed by hot blood." *People v Plummer*, 229 Mich App 293, 301; 581 NW2d 753 (1998) (citation omitted). For there to be premeditation and deliberation, "sufficient time must have elapsed to allow the defendant to take a 'second look.'" *Id*. (citation omitted). "Premeditation and deliberation may be established by evidence of (1) the prior relationship of the parties; (2) the defendant's actions before the killing; (3) the circumstances of the killing itself; and (4) the defendant's conduct after the homicide." *Abraham, supra* at 656 (citation and quotation marks omitted). Further, a defendant's identity is an element of every crime. *People v Yost*, 278 Mich App 341, 356; 749 NW2d 753 (2008).

Here, Luna and Leos were friends who partied together. Sometime in early 1988, Leos became angry because his boyfriend, Osborne, was sleeping with VanEenenaam. On numerous occasions, Leos directed threats at Osborne, indicating that he was going to kill him. Before the deaths of Osborne and VanEenenaam, an acquaintance at the Moose Lodge overheard a conversation between Luna and Leos, in which Luna stated that he could take care of the problem for money. Later, on the night of March 8, 1988, two witnesses saw Leos and Luna bludgeon Osborne and VanEenenaam on their heads repeatedly. The group had driven together from the Moose Lodge to the house on Ninth Street. Apparently, just before heading over to the house, Ayala overheard Luna and Leos talking and saying that they were going to "take care of business." When the group arrived at the Ninth Street home, Ayala asked Luna why he had the "rolling pin" type weapon, to which Luna was unresponsive. Once inside, Leos attacked Osborne first while he was turned away. Luna prevented VanEenenaam from helping Osborne by throwing him onto the ground and by beating him on the head with the "rolling pin," which he had brought from the car. Defendants went and got carpets, rolled the bodies in them, put them in the trunk, and dumped them in the woods that same evening in order to hide them. Subsequently, Luna admitted to his cellmates that he had "f----d two faggots and left them in the

woods to die" and had been paid $1000 for his involvement by Leos. This evidence, when viewed most favorably to the prosecution, sufficiently establishes the elements of first-degree murder.

This certainly is not a case where the homicides occurred impulsively or "during a sudden affray." See *People v Tilley*, 405 Mich 38, 44-45; 273 NW2d 471 (1979). Rather, contrary to Luna's argument on appeal, the evidence establishes that Luna acted with premeditation and deliberation and was not merely acting negligently or impulsively. Luna was overheard telling Leos that he could him take care of his "problem" for the right amount of money. Further, on the night of the incident, Luna was overheard referencing whether Leos was ready to take care of "business." Luna then arrived at the Ninth Street residence with a club-like weapon. During the attack, Luna dealt repeated blows to his victim without hesitation once the attack began. Certainly, sufficient time elapsed during which Luna could have taken a "second look."

We also disagree with Luna's argument that his identity was not sufficiently established at trial because the witnesses establishing his identity were inherently incredible. Both Uvalle and Ayala identified Luna as the individual who beat VanEenenaam and helped Leos dump the bodies in the woods. While both Uvalle and Ayala's testimonies were impeached to some extent on cross-examination, our review of the record reveals that their testimonies were not impeached to the extent that their testimonies could not be reasonably believed. See *People v Lemmon*, 456 Mich 625, 643-644; 576 NW2d 129 (1998). Rather, during direct and cross-examination, both these witnesses explained the rational reasons why they had previously provided investigators with false statements. Thus, the testimonies of Ayala and Uvalle were not so inherently incredible as to be unbelievable and this Court will not usurp the jury's role of weighing the evidence and assessing the credibility of the witnesses in such instances. *People v Harrison*, 283 Mich App 374, 378; 768 NW2d 98 (2009).

Accordingly, we conclude that the evidence, when viewed most favorably to the prosecution, sufficiently supports Luna's two convictions for intentionally killing another human being with premeditation and deliberation. Thus, there is no merit to Luna's related argument that the trial court erred by denying his motion for directed verdict, as that motion was based on the allegedly insufficient evidence.

B. Evidentiary Rulings

Luna next argues that the trial court made numerous erroneous evidentiary rulings. We consider each claim of error in turn.

i. Right to Confrontation

Luna first posits that the trial court erred by denying the admission of certain testimony that defense counsel attempted to elicit on cross-examination. Specifically, Luna contends that the trial court's rulings as to witnesses Sanchez and Uvalle prohibited him from advancing a line of questioning thereby violating his right to confrontation. We disagree. Because Luna did not object to the court's rulings on confrontation grounds below, our review is for plain error effecting defendant's substantial rights. *People v McPherson*, 263 Mich App 124, 138; 687 NW2d 370 (2004).

A defendant has a constitutional right to confront witnesses who testify against him. US Const, Am VI. Generally, this right is secured by a defendant's ability to cross-examine those witnesses. See *People v Spangler*, 285 Mich App 136, 142-143; ___ NW2d ___ (2009). "A limitation on cross-examination preventing a defendant from placing before the jury facts from which bias, prejudice, or lack of credibility of a prosecution witness might be inferred constitutes denial of the constitutional right of confrontation." *People v Cunningham*, 215 Mich App 652, 657: 546 NW2d 715 (1996). However, "[n]either the Sixth Amendment Confrontation Clause, nor due process, confers on a defendant an unlimited right to cross-examine on any subject." *People v Canter*, 197 Mich App 550, 564; 496 NW2d 336 (1992). "Cross-examination may be denied with respect to collateral matters bearing only on general credibility, as well as on irrelevant issues" *id.* (internal citation omitted), and may "bow to accommodate other legitimate interests of the trial process or of society," *People v Adamski*, 198 Mich App 133, 138; 497 NW2d 546 (1993).

a. Witness Sanchez

Here, Sanchez testified on direct examination that he was currently facing a pending criminal charge for several counts of criminal sexual conduct and that he had been offered a plea bargain in exchange for his testimony against Luna. On cross-examination, the following colloquy occurred between defense counsel and Sanchez:

> *Q*. Now you've indicated that you came forward because if something had happened to your children you would want people to come forward?
>
> *A*. That is correct.
>
> *Q*. You wouldn't want something bad to happen to anybody's child, would you?
>
> *A*. No.
>
> *Q*. Well, isn't it true that you, what you're charged with—
>
> Prosecutor. Objection, Your Honor.

The trial court sustained the prosecutor's objection, apparently agreeing with the prosecutor that Sanchez's answer as to the facts of his case would not be relevant to the present matter and that delving into such matters could violate Sanchez's right against self-incrimination. Luna did not challenge the prosecutor's assertion that the inquiry could implicate Sanchez's Fifth Amendment rights.

We see no error in the trial court's decision. Preventing cross-examination as to the factual details of the charges pending against Sanchez was a reasonable limitation on Luna's right to cross-examine the witness, as such an inquiry could, as the prosecutor argued, implicate Sanchez's right against self-incrimination. Further, we simply fail to see how such details would be relevant to demonstrating the witness's bias and defendant has not offered any explanation on appeal. In any case, defense counsel was still able to question Sanchez about the charges pending against him and the circumstances surrounding his plea agreement. Even the prosecutor made it clear on direct examination that Sanchez had an interest in testifying about Luna's

statements in exchange for a more favorable plea agreement. As such, evidence of Sanchez's motive to testify against Luna was made clear to the jury. Thus, even assuming for the sake of argument that the court's decision had been erroneous, it was therefore harmless.

b. Witness Uvalle

Luna also argues that he was improperly denied his right to confront Uvalle on cross-examination. We disagree.

Here, defense counsel asked Uvalle whether she had charges "pending" during the re-opened investigation. Counsel stated, "In January of 2007, you had charges pending of possession of a financial transaction device, didn't you?" The prosecutor objected to defense counsel's use of the word "pending" on the grounds that it suggested to the jury that she was offered a benefit in her case when, according to the prosecutor, she had never been offered a benefit. Defense counsel countered that it was necessary to show that she had been offered a benefit. The trial court sustained the objection "to the question as it is asked." Defense counsel then went on to question Uvalle about her conviction but never asked her whether she received a sentencing deal or other benefit as a result of her cooperation in this case.

Again, we fail to see any error. Luna's right to confront Uvalle was not limited in any meaningful way. Counsel was merely prevented from asking whether she had a charge "pending" during the investigation. Counsel was not otherwise prevented from attempting to reveal that Uvalle was biased or had a motive to testify against defendants because she may have been provided a benefit in her own case. Rather, counsel simply chose not to directly ask that question, when counsel clearly could have given the scope of the court's ruling. Thus, there was no error and Luna's right to confrontation was not violated.

ii. Prior Inconsistent Statements

Luna next contends that the trial court erred by refusing to admit tapes of Uvalle's prior interviews as impeachment evidence. In addition, Luna claims that the court's ruling violated Luna's right to confrontation because "her knowledge of and fluency of [the] English [language] was never tested before the jury." We disagree. We review the trial court's decision to disallow the tapes as impeachment evidence for an abuse of discretion. *Washington, supra* at 670. Further, because counsel did not object on confrontation grounds, our review of that sub-issue is for plain error affecting defendant's substantial rights. *McPherson, supra* at 138.

Typically, a witness' prior inconsistent statements are permitted for impeachment purposes. MRE 613(b) provides, in part:

> Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate the witness thereon, or the interests of justice otherwise require.

Here, defense counsel anticipated impeaching Uvalle's testimony with prior recorded police interviews. Counsel asked the trial court for guidance regarding the admission of these tapes and their use to refresh her recollection because, if every single tape were played, it would "become a

very long and arduous process." The trial court responded, "[I]f it's going to be used for the purpose of refreshing her memory, it certainly is not appropriate to play them in the presence of the jury." Counsel indicated that he would like to "reflect on this" over a recess. When trial resumed, defense counsel continued his cross-examination of Uvalle and, a few minutes into the examination, indicated that he would like to play a tape for the jury in order to refresh Uvalle's memory. The prosecutor objected, indicating that defense counsel could call the detective to the stand. The trial court indicated that it would sustain the prosecutor's objection on those grounds, to which defense counsel replied:

> All right. Then let me make this clear. At this point in time, Your Honor, I'm asking to either allow her to listen to her interview to refresh her memory, in or out of the presence of the jury, or, in the alternative, I'm asking to allow the jury to hear that portion of this interview that is on an audio cassette tape that was provided by the Holland Police Department.

The court ruled that the tapes could be played outside the presence of the jury consistent with defense counsel's request.

Given the foregoing, it is plain that defense counsel abandoned his attempt to admit the tapes as impeachment evidence. Rather, he sought to admit them solely for the purpose of refreshing Uvalle's recollection and specifically requested that they be played outside the presence of the jury for purposes of refreshing her recollection. The trial court granted defense counsel's request. Further, because counsel abandoned his attempt to admit the tapes as impeachment evidence, the trial court made no ruling on the issue and there is no ruling for this Court to review. Thus, it cannot be said that the trial court erred.

We also fail to see why the trial court's alleged error in refusing to admit the tapes for impeachment purposes violated Luna's right to confrontation. According to Luna, the tapes would have demonstrated Uvalle's understanding of the English language. Luna, however, has failed to explain how this information would have tended to impeach her testimony. In any case, her knowledge of the English language was revealed to the jury during her testimony: She was provided an interpreter, but sometimes answered in English, and defense counsel was permitted to cross examine her in English. Thus, we consider this argument abandoned. *Badiee v Brighton Area Schools*, 265 Mich App 343, 357; 695 NW2d 521 (2005).

C. Transcripts

Luna next asserts that the trial court erred by denying his post-trial motion for trial transcripts prepared in the Spanish language. He contends that denial of the transcripts in Spanish has denied him equal protection of the law. We disagree.

The Equal Protection Clause requires that the government treat all similarly situated persons alike. *El Souri v Dep't of Social Services*, 429 Mich 203, 207; 414 NW2d 679 (1987) Here, Luna has failed to show that the applicable court rule, MCR 8.108,[4] treats similarly situated persons, in this case, convicted defendants, differently. Rather, this rule, in our view, treats all guilty defendants alike: each of them may receive a transcribed copy of the proceedings in English, which ensures their right to access the courts. Significantly, nothing in the language of the rule evinces a discriminatory intent toward a particular group of persons nor does it deny any persons access to the courts. Accordingly, relief is not warranted on this basis.

D. Co-Defendant's Arguments

Lastly, Luna asserts that if Leos prevails on appeal, he should also be able to obtain relief because the same jury tried them both. We do not disagree with this contention. However, defendant Leos did not prevail on any of his issues on appeal and, thus, Luna cannot avail himself of relief on this basis.

Affirmed.

/s/ Kirsten Frank Kelly
/s/ Joel P. Hoekstra
/s/ William C. Whitbeck

[4] MCR 8.108(E) and (F)(1) provides:

> (E) Furnishing Transcript. The court reporter or recorder shall furnish without delay, in legible English, a transcript of the records taken by him or her (or any part thereof) to any party on request. The reporter or recorder is entitled to receive the compensation prescribed in the statute on fees from the person who makes the request.
>
> (F) Filing Transcript.
>
> (1) On order of the trial court, the court reporter or recorder shall make and file in the clerk's office a transcript of his or her records, in legible English, of any civil or criminal case (or any part thereof) without expense to either party; the transcript is a part of the records in the case.